In the High Court of Judicature at Madras

Dated : 23.7.2007

Coram :

The Honourable Mr.Justice K.RAVIRAJA PANDIAN

and

The Honourable Mr.Justice P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.942 of 2007

The Commissioner of Income Tax
Chennai. .. Appellant

Vs

M/s.Cafco Syndicate Shipping Co.,
No.9,Old No.5, 3rd Floor
Errabalu Chetty Street
Chennai 1. .. Respondent

TAX CASE (APPEAL) under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 25.1.2007 made in I.T.A.No.1130/Mds/2005 for the assessment year 2002-03 and against the Order of the Commissioner of Income Tax, [Appeals] IX Chennai dated 25.02.2005 and made in ITA.93/2004-05 and against the penalty order under Section 271[1][c] for the Assessment year 2002-03 dated 18.3.2004, GIR No.33493 P, PAN AABFC 3747 R.

For Appellant : Mr.J.Naresh Kumar
Junior Standing Counsel (Income Tax)

JUDGMENT OF THE COURT WAS DELIVERED BY K.RAVIRAJA PANDIAN,J

This appeal is filed invoking Section 260A of the Income Tax Act, against the order of the of the Income Tax Appellate Tribunal Madras 'A' Bench made in I.T.A.No.1130/Mds/2005 dated 25.1.2007 . The relevant assessment year is 2002-03. The substantial questions of law formulated for entertainment of the appeal are as follows:-

1. Whether on the facts and circumstances of the case, the Tribunal was right in holding that no penalty under Section 271(1)(c) is impermissible as nothing was concealed from the department, when the assessee had filed revised returns admitting an additional income of Rs.22,65,900/- only after the survey under Section 133A of the I.T. Act 1961 ?

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2. Whether on the facts and circumstances of the case liability to penalty can be avoided by filing a revised return after concealment was detected by the assessing officer by a survey u/s 133A of the Income Tax Act 1961 ?

2. The statement of facts as culled out from the grounds of appeal is as follows:-

The assessee is engaged in the business of clearing and forwarding of import and export cargo at Chennai Port. The assessee filed its return of income on 30.10.2002 admitting a total income of Rs.7,27,150/- There was a survey operation under Section 133A on 10.12.2002. During the course of survey at the business premises of the assessee, it was noticed that some of the vouchers of expenses were self-vouchers and they were not supported by third party receipts, vouchers, etc. The assessee filed a revised return on 24.12.2002 admitting the total income of Rs.29,93,050/-. The Assessing officer held that since the expenditure were not supported by proper vouchers, the appellant should not have claimed the expenditure for deduction, especially when the amount involved is huge. Therefore, the assessing officer held that the assessee has concealed income to the tune of Rs.22,65,900/- and thus imposed a penalty of Rs.8,08,925/- under Section 271(1)(c). Aggrieved by the assessment order, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who allowed the assessee's appeal on the ground that the assessing officer has not proved such expenses were not incurred by the assessee. Aggrieved by the order of the Commissioner of Income Tax Appeals the Revenue filed an appeal before the Income Tax Appellate Tribunal. The Tribunal relying on the decision of this Court in the case of COMMISSIONER OF ICOME TAX VS. S.SANKARAN (241 ITR 825), wherein it was held that mere addition of income by disallowing expenses would not be regarded as concealment of income and therefore levy of penalty under Section 271(1)(c) was not justified in such cases, has confirmed the order of the Commissioner of Income Tax Appeals. The correctness of the said order is now put in issue before this Court.

3. Learned counsel appearing for the Revenue submitted that but for the survey the assessee would not have filed revised return and further the admission of additional income in the revised return consequent to survey is an acceptance by the assessee and that the addition would amount to concealment. Section 271(1)(c) speaks about not only concealment but also incorrect particulars. The present case if does not come within "concealment" it would at least come within "incorrect particulars".

4. We heard the arguments of the learned counsel for the Revenue and perused the materials on record.

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5. The issue has been squarely answered by the Supreme court in the case of DILIP N. SHROFF VS. JOINT COMMISSIONER OF INCOME TAX AND ANOTHER (291 ITR 519) wherein it has been held that Clause (c) of Section 271(1) of the Income Tax Act, 1961 categorically states that penalty would be leviable if the assessee conceals particulars of his income or furnishes inaccurate particulars thereof. But by reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Not only is the levy of penalty discretionary in nature but the discretion is also required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors, apart from being inherent in the nature of penalty proceedings, inhere on the face of the statutory provisions. Penalty proceedings are not to be initiated merely to harass the assessee. The approach of the Assessing Officer in this behalf must be fair and objective. "Concealment of income" and" furnishing inaccurate particulars" are different. Both concealment and furnishing of inaccurate particulars refer to deliberate acts on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi.

6. The Apex Court further observed that the explanation appended to Section 271(1)(c) is an exception to the general rule. It raises a legal fiction by reason whereof the burden of proof shifts from the Department to the assessee. Legal fiction, however, as is well known, must be given full effect the conditions precedent thereof are satisfied and not otherwise.

7. The object of an Explanation to a statutory provision is (a) to explain the meaning and intendment of the Act itself (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve; (c) to provide additional support to the dominant object of the Act in order to make it meaningful and purposeful; (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof, but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act, it can help or assist the court in interpreting the true purport or intendment of the enactment; (e) it cannot however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same.

8. The Supreme Court after referring to the earlier judgments of the Supreme Court , further observed that the word" inaccurate" signifies a deliberate act or omission on the part of the assessee. Deliberate act must be either for the purpose of concealment of income or furnishing inaccurate particulars. The Supreme Court further held that in the

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absence of any definition to the term "inaccurate particulars" furnishing of inaccurate particulars for the value of property may not by itself be construed as furnishing inaccurate particulars. The Supreme Court further observed that the assessing officer has to record a finding that the explanation offered by the assessee in the event he offers one, was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus apart from his explanation being not bona fide, it should have been found as a fact that he has not disclosed all the facts which were material to the computation of his income.

9. So far as the present case is concerned the assessing authority has given reasons for imposition of penalty as follows:-

"As the expenses claimed are not supported by proper vouchers the assessee offered for assessment Rs.22,65,900/- in the course of survey operation. This is clear indication that the assessee had claimed expenditure to the tune of Rs.22,65,900/- though no proper vouchers existed for the same. Since the expenditure incurred is not supported by proper vouchers, the assessee should not have claimed the same, especially when the amount involved is huge. The fact of filing revised return when concealment was detected by the department is admission of the concealment.

10. We are not able to subscribe our view to the stand taken by the assessing officer. Admittedly, the expenses to the tune as aforesaid has already been there in the books of accounts. The one and only reason for the assessee to file the revised return was that he was not able to produce the proper voucher for the expenses incurred for the above said amount. The primary burden of proof is on the revenue. The books of accounts revealed that the expenses were incurred by the assessee, but the only incapacity on the part of the assessee was that he was not able to produce proper voucher for the expenses incurred and that would not amount to concealment of income as observed by the Supreme Court in the above said judgment, particularly having regard to the nature of the assessee's business. In view of the facts and in the light of the judgment of the Supreme Court, we find no reason to interfere with the order of the lower authorities who have consistently taken a view that imposition of penalty under Section 271(1)(c) is impermissible. Hence,

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we are of the view that the appeal deserves no entertainment as it involves no question of law . The Tax Case Appeal is dismissed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

krr/

To
1.The Assistant Registrar, Income-Tax Appellate Tribunal, III Floor, Rajaji Bhavan, Besant Nagar, Madras 90 (with records five copies).

2.The Secretary, Central Board of Revenue, New Delhi (3 copies).

3. The Income Tax Officer, Ward -IX(3), Chennai.

+ 1 CC To M/s.Pushya Sitaraman, Advocate SR NO.45541

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gp/21.8.

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